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IN THE

Supreme Court of the United States

No. 611—OCTOBER TERM, 1964

JOHN P. LOMENZO, Secretary of State of the State of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Appellants,*

and

JOHN H. HUGHES and LAWRENCE M. RULISON, *Intervenors-Appellants,*

against

WMCA, INC., R. PETER STRAUS, JOSEPH DeMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY, *Plaintiffs-Appellees,*

and

PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; MAURICE J. O'ROURKE, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City, *Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF ATTORNEY GENERAL AND SECRETARY OF STATE

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This appeal is taken from a July 27, 1964 decree of a District Court of three judges, entered upon a mandate of this Court. The District Court decree so entered on August

4, 1964 is in effect a permanent injunction which: (1) prohibits members of the Legislature of the State of New York, who are to be elected at the general election to be held November 3, 1964, from serving for more than a period of one year ending December 31, 1965, thereby disregarding the portion of Art. III, § 2, of the Constitution of the State of New York, fixing a two-year term for members of both branches of the New York State Legislature; (2) directs that the Legislature adopt a "valid" reapportionment statute by April 1, 1965; and (3) directs that another election be held in November, 1965, to elect members of the Legislature for an additional period of one year ending December 31, 1966, in further disregard of that portion of the New York State Constitution, Art. III, § 2, that designates only the even-numbered years as those in which general elections of members of the State Legislature are to be held.[1]

Opinion Below

The Court announced its decree from the Bench, and wrote no opinion, save the following informal announcement to counsel who had theretofore argued orally as to the form of the decree (Minutes, p. 193):

"JUDGE WATERMAN: Gentlemen, we have given serious consideration to what this decree should pro-

[1] This appears to be a necessary inference from the language of the section just cited, which reads: "§ 2. * * * The senators elected in the year one thousand eight hundred and ninety-five shall hold their offices for three years and their successors [obviously to be chosen in 1898] shall be chosen for two years. The assemblymen elected in the year one thousand nine hundred and thirty-eight, and their successors, shall be chosen for two years." The inference we make is re-enforced by the language of N. Y. Election Law, § 191, Subd. 1 (c) (L. 1963, ch. 940). A long-standing State policy, requiring the election in odd-numbered years of city and certain county officers and separating those election years from the even-numbered years in which State elections are designated to be held, had, prior to the 1963 general simplification of constitutional and statutory provisions relating to local government, been provided for, since 1939, in New York Constitution, Art. IX, § 15 and had been derived from Const. 1894, Art. XII, § 3, as amended in 1923.

vide and we have prepared one which I will read. It is a unanimous decree of the three of us. You will note that it does not prevent the voluntary action within the timetable set forth of either the Governor or the Legislature. We will have the reporter give you copies within a very few minutes."

The text of the decree will be found in Appendix A.

Jurisdiction

The appeal is authorized by 28 U.S.C.A. § 1253. There are precedents for returning to this Court and for presenting to it questions as to the conformity of a District Court decree with a mandate of this Court. *Continental Insurance Co. v. United States*, 259 U. S. 156 (1922). The remedy of mandamus is deemed inappropriate because the opinion of this Court (377 U. S. 633) reposed discretion in the District Court.

A notice of appeal was filed in the office of the Clerk of the District Court (S.D.N.Y.) on August 24, 1964 on behalf of the appellants, Lomenzo and Lefkowitz. On the same day, John H. Hughes and Lawrence M. Rulison, two members on the New York State Legislature, were permitted to intervene herein. They filed a separate notice of appeal on August 25, 1964 from the same decree of the three-judge court.

Questions Presented

A. Whether the District Court exceeded or abused the authority and discretion conferred upon it by the mandate of this Court dated July 10, 1964;

B. Whether the Supremacy Clause of the United States Constitution *required* the District Court to regard as null and void the provisions of the New York State Constitu-

tion relating to the terms and dates of election of the members of the New York State Legislature.

C. Whether the District Court disregarded, *improperly*, the provisions of the New York State Constitution, Article III, § 2, relating to the terms and dates of election of the members of the New York State Legislature.

D. Whether the District Court erred in requiring the New York Legislature to enact into law not later than April 1, 1965 a valid apportionment scheme that is in compliance with the Fourteenth Amendment of the United States Constitution.

E. Whether the District Court could thus deny the People of the State of New York an adequate opportunity to utilize the methods available under the New York Constitution, Art. XIX, § 1, to amend Art. III of the New York Constitution, which deals with apportionment, in order to comply with the standards imposed by this Court's previous decision herein, dated June 15, 1964.

Constitutional Provisions Involved

Upon the basis of a complaint that the New York Constitution, Art. III, §§ 2, 3, 4 and 5 violated the Fourteenth Amendment of the United States Constitution, this Court (377 U. S. 633) held that the apportionment "formulas" contained in the New York Constitution could not be "constitutionally condoned" (377 U. S., at p. 654). This Court remanded the case to the District Court "for further proceedings consistent with the views stated here and in our opinion in *Reynolds* v. *Sims*" (377 U. S., at p. 655). In this case, the Chief Justice wrote concerning the effectuation of "remedies" (377 U. S., at p. 655):

> "Since all members of both houses of the New York Legislature will be elected in November, 1964, the

court below, acting under equitable principles, must now determine whether, because of the imminence of that election and in order to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, it would be desirable to permit the 1964 election of legislators to be conducted *pursuant to the existing provisions*, or whether under the circumstances the effectuation of appellants' right to a properly weighted voice in the election of state legislators should not be delayed beyond the 1964 election" (Italics supplied).

The District Court followed *neither* of the alternatives set forth in the Chief Justice's opinion.

Because it had been demonstrated that chaos and confusion would follow any attempt to enforce at the 1964 election the "effectuation of appellants' right to a properly weighted voice in the election of state legislators", the District Court properly declined to order such an effectuation at the 1964 election. The District Court held (Appendix A, *infra*):

"Inasmuch as the primary election of June 2, 1964, had been held and nominees chosen prior to the decision of the Supreme Court of June 15, 1964, and in view of the imminence of the 1964 election of Members of the New York State Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, the 1964 election of Assemblymen and Senators shall be conducted as presently scheduled."

But then, instead of following the *other alternative* suggested by this Court, and deciding that, "in order to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, it would be desirable to permit the 1964 election of legislators to be conducted *pursuant to the existing provisions*"

(italics supplied), the District Court directed that the members of the Legislature elected in November, 1964, hold office for only one year or a half-term; that a "valid" apportionment scheme be enacted by April 1, 1965; and that the members of the Legislature also be elected in November, 1965, under a "valid" apportionment plan for an additional one year or a half-term.[2]

Thus, the District Court ordered the 1964 election to be held as scheduled; disregarded the portion of this Court's majority opinion indicating the desirability of holding such election "pursuant to the existing provisions" and created a situation which places in question the length of the term for which members of the State Legislature will be elected on November 3, 1964.

Solicitude for orderliness and the minimization of chaos and confusion was shown in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), rehearing den., October 12, 1964 where this Court said (p. 584):

> "We agree with the view of the District Court that state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible."

Since this Court indicated clearly that a District Court should "accommodate" the relief it ordered, even as "to the apportionment provisions of state constitutions

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[2] At the July 27 hearing, when the District Court first indicated it might cut down the legislator's term of office, the Attorney General promptly cautioned the Court that such an order would be legally improper and would add to the delay of, rather than bring about, a prompt solution of the already complicated problem which this Court's mandate presented (Minutes, pp. 109-122).

insofar as possible", it would seem to follow that such accommodation certainly should have been attempted as to the non-apportionment provisions of our New York State Constitution.

The Questions Presented Are Substantial

Despite strong indications in the record (particularly by Circuit Judge WATERMAN, Minutes, pp. 20, 120, 183-184) that the three-judge Court assumed that its order was required by respect for the Supremacy Clause, this Court will recall that it had said nothing whatsoever about the terms of office of either senators or assemblymen. Accordingly, we seek an opportunity to argue before this Court the question whether anything in this Court's opinion required or even suggested that the District Court provide that senators and assemblymen elected in 1964 *should hold office for one year only*, instead of two years, as provided in Article III, § 2. Indeed, at the July 27th hearing, one of the District Court Judges repeatedly and in various forms stated that the Court had "no power by a judicial act to accomplish an amendment of the State Constitution" (RYAN, J., pp. 102, 111, 112, 113).

Because the validity of the New York constitutional provision for a two-year term of office has nothing to do with equality of representation, and was not assailed in the complaint, we see no reason for inferring that this Court intended that the District Court should disregard it and substitute a different and shorter term, particularly since one alternative of this Court's opinion indicated that it might be "desirable" to permit the 1964 election of New York legislators to be conducted pursuant to "the existing provisions" (377 U. S., at p. 655).

Furthermore, New York has, as a matter of firm public policy, provided that elections for members of the Legislature shall be held in even-numbered years (N. Y. Const., Art. III, § 2, construed, as we showed, *ante*, it has to be

construed) and that elections for city and certain county officers shall be held in odd-numbered years. Election Law, § 191, subd. 1(c), *supra*, p. 2. We submit that nothing in this Court's opinion of June 15, 1964, required that this policy be flouted and set at naught. Nothing in this Court's decision herein required that there be disregarded a State policy to separate, for the benefit of the voting public, State issues from those relating to city and certain county offices.

If the members of the Legislature sitting in 1965 will have been elected for only a one-year term at the 1964 general election, their enactments, including reapportionment legislation, may be challenged because they were not elected in conformity with New York Constitution, Article III, § 2. The same will be true of the Legislature sitting in 1966, because it will have been elected only for a one-year term and, in addition, in an odd-numbered year, to wit, 1965.

A further question is whether the District Court acted properly, under this Court's mandate, in requiring the Legislature to pass a reapportionment act by April 1, 1965.

It should be observed that the District Court's action was taken in the face of assurances from the Governor, the leaders of the majority party of both houses of the State Legislature, and the Chairman of the Joint Legislative Committee on Reapportionment, as well as the defendants, Secretary of State and Attorney General, that they were determined that New York would have a new apportionment statute, valid under the Fourteenth Amendment, in time for the next succeeding general election of Senators and Assemblymen in 1966. (See Appendix B: affidavits of Governor Rockefeller and Exhibits "A", "B" and "C" attached thereto; and affidavits of Senators Mahoney and McEwen and Assembly Speaker Garlino; see also Minutes, pp. 17, 25, 86, 92, 110, 137-138.)

The District Court paid little attention to these assurances (184 *et seq*). So, too, did it disregard the Gov-

ernor's effort to obtain from a distinguished committee of New York citizens objective advice on a series of questions related to the subject of reapportionment (185-191).

The history of the subject of reapportionment has already shown that apparent "speed" in devising new schemes of apportionment may lead ultimately to unnecessary delay in effectuating a plan truly valid under the Fourteenth Amendment. See, for example, *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 724-730, where even popular approval did not save a plan predicated upon improperly-drawn lines. Note, too, that on July 17, 1964, Colorado's speedily enacted legislative reapportionment act was declared unconstitutional by the Colorado Supreme Court. *White* v. *Anderson*, —— Col. ——, 394 P. 2d 333. Note further that in Connecticut, the District Court's efforts to rush through a new apportionment have led to such a chaotic situation that no general election for members of the state legislature at all is being held in that State in 1964. Cf. N. Y. Public Officers Law, § 5, prohibiting, however, in New York, any holdover by an officer whose term is fixed by our Constitution.

We assume to be applicable herein the *caveat* contained in *Roman* v. *Sincock*, 377 U. S. 695, 711, that Fourteenth Amendment rights are not to be delayed by the time limitations of our own Constitution. We further assume that this Court's decision herein required and permitted the New York Legislature to enact a new legislative reapportionment plan in time to be effective for the 1966 general election. See also *Maryland Committee* v. *Tawes*, 377 U. S. 656, 675-676, where this Court not only recognized the existence of inherent state legislative power "to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements", but also made no direction for any curtailment of the term of the Maryland legislators' four-year term, even though this Court ob-

served that Maryland's next election will not be conducted until 1966. Cf. *Fortson* v. *Toombs*, where this Court (No. 300, Oct. 1964 Term) has noted probable jurisdiction.

New York, through duly constituted officers, sought from the District Court an adequate opportunity to survey the problems presented by this Court's mandate and to conform with the June 15, 1964 decision herein. It will now ask this Court that the District Court order be revised so that it will be permitted to set its own electoral machinery in order in a manner chosen by the representatives of the people of New York.[3] The numerous legal and practical problems presented do not permit a hasty solution.

A more reasonable approach to the solution of these problems was suggested by this Court's opinion, which we submit, appears to have been disregarded by the District Court. There exists no "irreconcilable conflict" between the Fourteenth Amendment and the two-year term provisions of the New York Constitution relating to the election in even-numbered years of the members of its State Legislature. See *Reynolds* v. *Sims*, 377 U. S. 533, 584 (*supra*, p. 6).

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[3] See *Butcher* v. *Bloom*, —— Pa. —— (No. 198 Misc., decided September 29, 1964), where after holding the Pennsylvania Apportionment Acts of January 9, 1964 (25 P.S. 2217 and 2221) to be unconstitutional by reason of this Court's decisions of June 15, 1964, the Pennsylvania Supreme Court, pursuant to the existing provisions of the Pennsylvania statutes, nevertheless, permitted the 1964 Pennsylvania election for State legislators to be held, even though the legislators were being elected for a two-year term. There ROBERTS, J. said:

> "The General Assembly of Pennsylvania is entitled to an opportunity to enact reapportionment legislation pursuant to the recent *Reynolds* cases and to our interpretation here of pertinent provisions of the Pennsylvania Constitution. Since the Legislature is intimately acquainted with the characteristics of Pennsylvania and is primarily responsible for constitutional apportionment, action by that body, taken promptly and in good faith, is more likely to achieve a workable constitutionally acceptable result than an apportionment following the suggested plan of the district court".

CONCLUSION

Probable jurisdiction should be noted, and the case advanced for hearing at as early a date as may be consistent with the Court's convenience.

Dated: New York, New York, October 19, 1964.

Respectfully submitted,

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APPENDIX A

July 27, 1964 Decree of District Court

1. Pursuant to Rule 34 of the Rules of this Court, the order and judgment of the Supreme Court of the United States be, and it hereby is, made the order and judgment of this Court;

2. The scheme of legislative apportionment of the State of New York is hereby declared to be unconstitutional and void as being in conflict with the XIV Amendment of the Constitution of the United States;

3. Inasmuch as the primary elections of June 2, 1964, had been held and nominees chosen prior to the decision of the Supreme Court of June 15, 1964, and in view of the imminence of the 1964 election of Members of the New York State Legislature and in order to give the New York State Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, the 1964 election of Assemblymen and Senators shall be conducted as presently scheduled; provided that the terms of said Members so elected on November 3, 1964, or at any special election to fill vacancies, shall expire on December 31, 1965, and providing further that not later than April 1, 1965, the Legislature shall have enacted into law a valid apportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965, Members so elected to hold office for a term of one year ending December 31, 1966;

4. That the Members of the New York Legislature elected at said general election to be held on November 3, 1964, and such Members, if any, as may be elected at any special

election during the year 1965 to fill vacancies in the New York Legislature, shall have for the calendar year 1965 only the full powers and privileges presently prescribed;

5. Plaintiffs' application for further injunctive relief is denied without prejudice to renewal upon notice for good cause shown; and

6. This Court retains jurisdiction of this case to conduct further proceedings as may be necessary.

Dated: New York, New York
July 27, 1964

(signed) Sterry R. Waterman
U. S. Circuit Judge

(signed) Sylvester J. Ryan
U. S. District Judge

(signed) Richard H. Levet
U. S. District Judge.

APPENDIX B—Affidavits of Governor, Legislative Majority Leaders and Chairman of Joint Legislative Committee on Reapportionment.

Affidavit of Nelson A. Rockefeller.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

NELSON A. ROCKEFELLER, being duly sworn, says:

1. I am the Governor of the State of New York and make this affidavit in support of the application of the defendant, Attorney General of the State of New York, that the judgment of this Court be further implemented by affording the New York State Legislature a reasonable opportunity to consider and fashion a constitutionally valid legislative apportionment plan and by permitting the 1964 election of members of the State Legislature to be conducted pursuant to present provisions of the State Constitution and Laws.

2. Although I am not a party to this proceeding, I make this affidavit at the request of the Attorney General in order to document for this Court the steps being taken in the course of executive and legislative action to enact a constitutionally valid legislative apportionment plan.

3. I am familiar with the decision and opinions of the United States Supreme Court in this proceeding. It is my firm determination that there be enacted by the New York State Legislature, as expeditiously as possible, a legislative apportionment plan that will comply with that decision. I have already taken action to achieve that objective and I shall continue to do so through the exercise of my powers as Chief Executive.

4. A unique characteristic of our democratic process has been the concept and development of a representative and independent Legislature—co-equal with the Executive and

Judicial Branches. Any apportionment plan adopted in response to the decision of the United States Supreme Court will have major and enduring effects on the future development of the New York State Legislature and representative government in the greatest State in the Union. Mature consideration must precede the adoption of such a plan.

5. It is essential that there remain with the Legislative Branch the primary function of considering and determining its own structure and characteristics within the framework of the Federal Constitution. As the United States Supreme Court emphasized in *Reynolds* v. *Sims*, "legislative reapportionment is primarily a matter for legislative consideration and determination" and "judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."

6. Mature consideration and adoption of a constitutionally valid legislative apportionment plan requires prompt study of profound and historic questions concerning the structure of representative government in the Legislative Branch. Among these questions are:

a. Whether a new apportionment plan should be embodied in a Constitutional amendment or in a statute.

b. Whether a Constitutional Convention should be convened to consider a new apportionment plan.

c. How "population" should be measured and whether a new census should be taken to reflect the latest figures.

d. Whether the terms of legislators should continue to be two years, or whether longer terms are now desirable.

e. Whether the number of members of either or both Houses of the Legislature should now be changed or whether any other change in the structure of the Legislature should be made.

f. Whether district lines should be drawn exclusively by the Legislature, or by some other body, or remain a shared responsibility between the Legislature and local legislative bodies as at present.

g. What significance should be attached to political subdivisions in an apportionment plan.

h. Whether the vote of individual legislators should be weighted according to population.

i. Whether reapportionments should be required more or less frequently than once every ten years.

j. Whether changes in the Election Law and the State's election machinery are necessary in connection with a new apportionment plan.

7. Shortly after the decision of the United States Supreme Court in this proceeding, I determined to appoint a special committee of outstanding citizens to undertake a prompt and objective study including these profound questions, thereby permitting the public to participate in their resolution and providing guidelines for consideration and adoption of a legislative apportionment plan. At the time I announced this determination, I stated that as soon as the committee reported to me, I would call a special session of the Legislature to consider and act upon a legislative apportionment plan (Exhibit "A", annexed to this affidavit). Promptly thereafter I appointed a seven-member, bipartisan Citizens' Committee on Reapportionment, composed of outstanding members of the public (Exhibit "B", annexed to this affidavit). In its work, the Committee will

have the full cooperation of the Legislature (Exhibit "A", annexed to this affidavit).

8. I have impressed upon the Citizens' Committee on Reapportionment the need for expedition and have communicated to it my desire that it render its report not later than December first of this year. The Committee has advised me that it will adhere to that time schedule (Exhibit "C", annexed to this affidavit). When the Committee's report is rendered, I shall convene the Legislature in special session to consider and act upon an apportionment plan. Such a special session will afford the Legislature an opportunity to act expeditiously, deliberatively and unfettered by the weight of other public matters customarily considered at regular legislative sessions.

/s/ NELSON A. ROCKEFELLER

Sworn to before me this
23rd day of July, 1964.

/s/ H. PHYLLIS SHELKIN,
Notary Public, State of New York
No. 41-8958048—Queens County
Cert. Filed in New York County
Commission Expires March 30, 1966

Exhibit A.

FOR IMMEDIATE RELEASE, MONDAY, JUNE 29, 1964

ROBERT L. MCMANUS, PRESS SECRETARY TO THE GOVERNOR

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY

STATEMENT BY GOVERNOR NELSON A. ROCKEFELLER

At a meeting of the State Republican leadership this morning, we were united in our determination to have enacted, as expeditiously as possible, an apportionment plan for the New York State Legislature which will comply with the recent reapportionment decision of the United States Supreme Court.

To this end, I will appoint a special committee of outstanding citizens to undertake a prompt and objective study of the profound and historic questions concerning the structure of representative government in the Legislative Branch raised by the Supreme Court's decisions.

As soon as this committee reports to me, I will call a Special Session of the Legislature to consider and act upon an apportionment plan.

Among the questions growing out of the Supreme Court's decisions which must be considered are the following:

1. Whether a new apportionment plan should be embodied in a Constitutional amendment or in a statute.

2. Whether a Constitutional Convention should be convened to consider a new apportionment plan.

3. How "population" should be measured and whether a new census should be taken to reflect the latest figures.

Appendix B.

4. Whether the terms of legislators should continue to be two years, or whether longer terms are now desirable.

5. Whether the number of members of either or both Houses of the Legislature should now be changed or whether any other change in the structure of the Legislature should be made.

6. Whether district lines should be drawn exclusively by the Legislature, or by some other body, or remain a shared responsibility between the Legislature and local legislative bodies as at present.

7. What significance should be attached to political subdivisions in an apportionment plan.

8. Whether the vote of individual legislators should be weighted according to population.

9. Whether reapportionments should be required more or less frequently than once every ten years.

10. Whether changes in the Election Law and the State's election machinery are necessary in connection with a new apportionment plan.

The legislative leaders have assured me that the special committee will have the full cooperation of the Legislature in its study of these matters.

Present at the meeting were the Governor; the Lieutenant Governor; the Attorney General; the Temporary President of the State Senate, Walter J. Mahoney; the Speaker of the State Assembly, Joseph F. Carlino; the Republican State Chairman, Fred A. Young; and members of their staffs.

Exhibit B.

FOR RELEASE IN THE PAPERS OF SUNDAY, JULY 12, 1964

ROBERT L. MCMANUS, PRESS SECRETARY TO THE GOVERNOR

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY

Governor Rockefeller's office announced today the appointment of his seven-member Citizens' Committee on Reapportionment which will undertake immediately an objective study of significant questions concerning the structure of representative government in the Legislative Branch of New York State raised by the recent Supreme Court decisions.

The establishment of the Committee follows the Governor's announcement on June 29th that the Republican leaders, at a meeting held on that date, were united in their determination to have enacted, as expeditiously as possible, an apportionment plan for the New York State Legislature.

The Governor designated William Hughes Mulligan, Dean of the Fordham University Law School, as chairman.

In appointing the Committee the Governor stated, "I am pleased that these distinguished citizens have agreed to serve on this bipartisan Committee. The Committee will make a thorough and objective analysis so that their report will form a basis for my calling a special session of the Legislature to consider and act on an apportionment plan."

The Governor said among question to be considered by the Committee are the following:

1. Whether a new apportionment plan should be embodied in a Constitutional amendment or in a statute.

Appendix B.

2. Whether a Constitutional Convention should be convened to consider a new apportionment plan.

3. How "population" should be measured and whether a new census should be taken to reflect the latest figures.

4. Whether the terms of legislators should continue to be two years, or whether longer terms are now desirable.

5. Whether the number of members of either or both Houses of the Legislature should now be changed or whether any other change in the structure of the Legislature should be made.

6. Whether district lines should be drawn exclusively by the Legislature, or by some other body, or remain a shared responsibility between the Legislature and local legislative bodies as at present.

7. What significance should be attached to political subdivisions in an apportionment plan.

8. Whether the vote of individual legislators should be weighted according to population.

9. Whether reapportionments should be required more or less frequently than once every ten years.

10. Whether changes in the Election Law and the State's election machinery are necessary in connection with a new apportionment plan.

The Governor expressed his desire that the Committee undertake its important task as promptly as possible so that its report can be submitted at the earliest opportunity.

The members of the Committee will serve without compensation but will be reimbursed for expenses incurred in the performance of their duties.

Appendix B.

Seven-member Citizens' Committee on Reapportionment

Dean William Hughes Mulligan, the Chairman of the Committee, was associated with, and later was a partner in, the law firm of Manning, Hollinger and Shea from 1948 until 1954. In 1946 he became a member of the Fordham Faculty. Ten years later he was appointed Dean of the Law School. Dean Mulligan also holds the Wilkinson Chair of Law. He was appointed a member of the Law Revision Commission by Governor Averell Harriman in 1957 and reappointed to that Commission by Nelson A. Rockefeller in 1959. He is a member of the American Bar Association; the New York State Bar Association; Association of the Bar of the City of New York; and a Director of the Westchester County Legal Aid Society. Dean Mulligan resides at 7 Sturgis Road, Bronxville.

Other members of the Committee are:

Mr. Joseph P. Craugh of 8 Sunnyside Drive, Utica, Chairman of the Board of Chief Executive Officer of Utica Mutual Insurance Company. During the administration of Governor Franklin D. Roosevelt he was appointed a Referee in Workmen's Compensation by Industrial Commissioner Frances Perkins. Four years later he was appointed Assistant Secretary of the New York State Department of Labor. He also served as an Assistant Attorney General and later was appointed a member of the State Board of Standards and Appeals by Governor Lehman. In 1945 he resigned to become Counsel to Utica Mutual Insurance Company. In 1958 he became President of the Company and four years later assumed his present position. Mr. Craugh graduated from Holy Cross College and Fordham Law School. He is a member of the Oneida County, New York State, and American Bar Associations.

Mr. Charles R. Diebold of 75 Nottingham Terrace, Buffalo, President, Western Savings Bank of Buffalo. He

is a Member and Treasurer of the New York State Thruway Authority. Mr. Diebold is a Director of the Dickensen Mines Limited of Canada and Chairman of the Buffalo City Planning Board. He is a former Member of the New York State Banking Board and Past President of the Buffalo Chamber of Commerce and National and State Associations of Mutual Savings Banks. Mr. Diebold is a member of the American, New York State and Erie County Bar Associations.

Mr. Roswell L. Gilpatric of 124 East 62nd Street, New York City, is a partner in the firm of Cravath, Swaine & Moore. Mr. Gilpatric recently resigned as Deputy Secretary of Defense (1961-1964). Previously he was Assistant Secretary and Under Secretary of the Air Force. He was a panel member of the Rockefeller Studies Project from 1956 to 1957 and a member of the Symington Committee on the Defense Establishment and the Kennedy National Security Policy Committee (1960). He was a trustee of the Woodrow Wilson Foundation from 1956-61; and Chairman of the Board of Trustees of the Aerospace Corporation from 1960-61. Mr. Gilpatric is currently a member of the Council on Foreign Relations and of the New York State Defense Council. He is a member of the Association of the Bar of the City of New York, New York State Bar Association and New York County Lawyers' Association.

Judge Francis E. Rivers of 706 Riverside Drive, New York City, retired Judge of the Civil Court of the City of New York. He is a former member of the New York State Legislature representing the 19th Assembly District. From 1938 to 1943 he served as Assistant District Attorney of New York County. In 1943 he was appointed and subsequently elected a Justice of the City Court (now Civil Court) serving for ten years. He was re-elected for a second term and served until December, 1963 when he was

required to retire because of mandatory retirement age. Judge Rivers is a member of the American Bar Association; National Bar Association; Association of the Bar of the City of New York; New York County Lawyers Association; and Harlem Lawyers Association.

Mr. George M. Shapiro of 1160 Park Avenue, New York City, a partner in the firm of Proskauer, Rose, Goetz and Mendelsohn. He served on Governor Dewey's staff for nine years and was his Counsel from 1951 to 1954. Mr. Shapiro then served as Counsel to Senator Walter J. Mahoney, President Pro Tem and Majority Leader of the State Senate until 1959. In 1960 and 1961 he served as Chief Counsel to the Constitutional Revision Commission. He is Chairman of the Council for the State University Colleges of Medicine. Mr. Shapiro has served as a member of the Board of Trustees of Long Island University, the Board of Visitors of Columbia Law School, and on the Executive Board of the American Jewish Committee.

Mr. Eli Whitney Debevoise of 925 Park Avenue, New York City, partner in the law firm of Debevoise, Plimpton, Lyons and Gates. He was General Counsel to the United States High Commissioner in German and acted as Deputy High Commissioner, 1952-53. In 1954 he was a member of the New York Special Legislative Committee on Integrity and Ethical Standards in Government and in 1959-60 Chairman of the New York State Task Force on Youth and Juvenile Delinquency. Mr. Debevoise is a director of the American Fund for Free Jurists and the Legal Aid Society of New York. He is a member of the Association of the Bar of the City of New York, and the American, New York State and New York County Bar Associations. He is also a member of the American Bar Foundation, American Law Institute and the Council on Foreign Relations.

Exhibit C.

William Hughes Mulligan
Chairman

CITIZENS' COMMITTEE ON REAPPORTIONMENT

Joseph P. Craugh
Eli Whitney Debevoise
Charles R. Diebold
Roswell L. Gilpatric
Francis E. Rivers
George M. Shapiro

July 23, 1964

The Honorable Nelson A. Rockefeller
Governor of New York
22 West 55th Street
New York, New York

My dear Governor Rockefeller:

I am pleased to report to you that the members of the Citizens' Committee on Reapportionment which you recently appointed, have had the opportunity of informal discussions together, as well as a formal meeting which was held this morning. In your letter of appointment you have requested that we undertake a study which will be thorough, objective and on a bipartisan basis. Since your original communication your Counsel, Sol Neil Corbin, Esq., has advised me of your request that our report be completed no later than December 1, 1964. Please be assured that the Committee is fully cognizant of the importance of the undertaking and pledges to comply with the deadline you have proposed.

Since the formation of the committee, its members, all of whom are attorneys, have taken the opportunity to study the opinions of the United States Supreme Court which have mandated the reapportionment of State legislative bodies substantially on a population basis. The

problems posed are indeed profound and complicated and their solution will essentially involve the structure and composition of the legislative branch of our State government.

In the first instance we propose to undertake a study to determine how reapportionment can be effected legally and constitutionally under both our Federal Constitution as interpreted by the Supreme Court as well as our own State Constitution. Article III of the New York State Constitution provides in elaborate detail for the composition, terms of office, election and apportionment of our State Senate and Assembly. There is an immediate question as to whether or not some of these provisions remain valid and constitutional and may well be unaffected by the decisions of the Supreme Court. There are difficult questions as to the areas in which the Legislature is free to deviate from existing State constitutional provisions. While recognizing therefore our obligation to act within the time limits you have set forth, the Committee believes that the best interests of the State obviously require that the matter be given more than cursory or impulsive consideration. The press recently reported that the Colorado State Legislature in a brief session adopted a plan of reapportionment for that State which has already been held to be unconstitutional by the Supreme Court of Colorado. We plan a thorough study which is intended to point out the pitfalls which might lead to vexing questions as to the status of legislators and the validity of legislation.

We should further note that most if not all of our sister states are in the process of reviewing their own state laws and procedures and we plan to establish liaison with them in an effort to gain whatever immediate benefit may be forthcoming from their experience.

In your letter of appointment you requested that among other problems the Committee study specifically ten questions. We do expect to have available to us the files of

other commissions and committees as well as the published studies of political scientists and scholars of the law. These will have to be carefully examined and evaluated in light of the recent opinions of the Supreme Court in addition to the original studies we propose to undertake. The questions posed are basic and of course permit of many alternative solutions. Among the questions which will require serious study and deliberation by the Committee before making its final report are the following: Should legislators be apportioned on the basis of total population or citizen population or on the basis of registered voters or actual voters and if on the basis of votes, should they be those cast in a presidential or gubernatorial year or in an election for legislative candidates; are the terms of legislators mandated by the Constitution and if not, should they be extended to a longer period and if so, for both legislative branches; should existing political subdivisions be respected and if so, to what extent; to what extent if any, is the present number of legislators mandated by the State Constitution and if it is not, should the present numbers be increased or decreased and if so, to what extent, having in mind efficient operation; is weighted voting possible under our present constitutional provisions and if it is, to what extent can it affect committee activity, seniority and other non-voting functions; should district lines be drawn by the legislature solely; should it be done in conjunction with local political subdivisions or should it be done in conjunction with or solely by a citizen agency. These are some of the questions which will require the earnest study and deliberation of this Committee.

I have reported to the Committee at our meeting that I have had the opportunity of conferring with your Secretary, Dr. William J. Ronan and with your Counsel, Sol Neil Corbin, Esq., and discussed with them a tentative budget which would be adequate to accomplish the staffing

of an office which will be necessary to accomplish our intensive and expeditious undertaking. I have been assured that the requested funds and facilities will be made available. I have been further advised that office space at 80 Centre Street in New York City has been allocated and will be fully equipped for our purposes. The Committee has received numerous applications and recommendations for staff and has undertaken an independent canvassing of prospective personnel. I fully anticipate that within a matter of days, we shall be able to announce the appointment of key staff. The Committee is continuing to study the problems outlined for our consideration.

In conclusion, sir, I can assure you that each of us fully realizes that at stake here is the future of representative government in this State and we are committed and dedicated to accomplishing our tasks with all the efficiency and energy at our command.

Respectfully yours,

WILLIAM H. MULLIGAN
William Hughes Mulligan
Chairman

Appendix B.

Affidavit of Walter J. Mahoney.

STATE OF NEW YORK }
COUNTY OF ERIE } ss.:

WALTER J. MAHONEY, being duly sworn, deposes and says:

1. I am a member of the New York State Senate and President Pro Tem thereof. I make this affidavit by reason of the ruling of this Court in which it suggested hearing from "duly constituted authorities of the State of New York" at the adjourned session of this Court on July 27th, 1964.

2. I was, of course, made aware promptly of the far-reaching decision of the Supreme Court of the United States in this and related cases on June 15th and June 22nd. Shortly thereafter, on June 29th, I attended a conference called by the Governor at which the Speaker of the Assembly Hon. Joseph F. Carlino, Lt. Gov. Wilson, Attorney General Lefkowitz and others were also present, to discuss the opinions in these cases. We were united in our determination to have enacted, as expeditiously as possible, an apportionment plan for the New York State Legislature which will comply with the recent reapportionment decision of the United States Supreme Court. It readily became apparent that the questions and problems raised by such opinions required careful and intelligent analysis and recommendations for implementations. The Governor stated his intentions to appoint a special committee of outstanding citizens to undertake a prompt and objective study of the profound and historic questions concerning the structure of representative government in the legislative branch raised by the Supreme Court's decisions.

3. The special committee named by the Governor will have the full cooperation of the Legislature in its study.

I understand that the Governor intends to call a special session of the Legislature as soon as the report of the special committee is received to consider and act upon an apportionment plan. At such session, I am certain, that the Legislature will act responsibly and expeditiously to comply with the decision of the United States Supreme Court.

I respectfully join in the application for the entry by this Court of the order submitted by the Attorney General.

WALTER J. MAHONEY.

Sworn to before me this
22nd day of July, 1964.

ROBERT J. AST
Notary Public, State of New York
Qualified in Erie County
My Commission expires March 30, 1965
Reg. No. 4436

Appendix B.

Affidavit of Joseph F. Carlino.

STATE OF NEW YORK
COUNTY OF NASSAU } ss.:

JOSEPH F. CARLINO, being duly sworn, deposes and says:

1. I am a member of the Assembly of the State of New York and Speaker of such New York State Assembly. I make this affidavit by reason of the ruling of this Court in which it suggested hearing from "duly constituted authorities of the States of New York" at the adjourned session of this Court on July 27th, 1964.

2. I was, of course, made aware promptly of the far-reaching decision of the Supreme Court of the United States in this and related cases on June 15th and June 22nd. Shortly thereafter, on June 29th, I attended a conference called by the Governor at which the Senate President pro tem Hon. Walter J. Mahoney, Lt. Gov. Wilson, Attorney General Lefkowitz and others were also present, to discuss the opinions in these cases. We were united in our determination to have enacted, as expeditiously as possible, an apportionment plan for the New York State Legislature which will comply with the recent reapportionment decision of the United States Supreme Court. It readily became apparent that the questions and problems raised by such opinions required careful and intelligent analysis and recommendations for implementation. The Governor stated his intention to appoint a special committee of outstanding citizens to undertake a prompt and objective study of the profound and historic questions concerning the structure of representative government in the legislative branch raised by the Supreme Court's decision.

3. The special committee named by the Governor will have the full cooperation of the Legislature in its study.

I understand that the Governor intends to call a special session of the Legislature as soon as the report of the special committee is received to consider and act upon an apportionment plan. At such session, I am certain, that the Legislature will act responsibly and expeditiously to comply with the decision of the United States Supreme Court.

I respectfully join in the application for the entry by this Court of the order submitted by the Attorney General.

JOSEPH F. CARLINO.

Sworn to before me this
22 day of July, 1964.

MYRON FRIEDMAN,
Notary Public,
State of New York.
No. 30-1327940.
Qualified in Nassau County.
Term Expires March 30, 1965.

Appendix B.

Affidavit of Robert C. McEwen.

STATE OF NEW YORK }
COUNTY OF ST. LAWRENCE } ss.:

ROBERT C. MCEWEN, being duly sworn, deposes and says:

1. He is a member of the Senate of the State of New York and the Chairman of the Joint Legislative Committee on Reapportionment of the State of New York.

2. That the Joint Legislative Committee on Reapportionment was created by concurrent resolution of the Senate and Assembly of the State of New York and adopted on March 29, 1949, and last continued until March 31, 1965, by concurrent resolution adopted March 26, 1964.

3. As originally constituted, the powers and duties of the committee were to assemble the data necessary for the alteration and readjustment of the Senate Districts and of the apportionment of members of the Assembly in accordance with the provisions of Article III, Sections 1 through 5 of the Constitution of New York after each federal decennial census and to prepare a bill readjusting and altering the Senate Districts and apportioning members of the Assembly and a report with respect thereto for submission to the legislature. By concurrent resolution adopted March 22, 1957, in addition to the powers originally conferred upon it, it was authorized to make a study of the provisions of the constitution and statutes of the State of New York affecting the powers and organization of the legislature.

4. After the federal decennial census of 1950, the committee prepared and submitted to the Legislature a bill

readjusting and altering the Senate districts and reapportioning members of the Assembly which was enacted as Chapter 893 of the Laws of 1953, Article VIII, Sections 120 to 125 of the State Law, effective for the 1954 general election. This act was held constitutional by the New York Court of Appeals in the Matter of Fay, 306 N. Y. 938.

5. After the first citizen population figures from the federal decennial census of 1960 were received from the Bureau of the Census late in 1961, the committee's staff began to do the necessary map work preparatory to drafting a new reapportionment bill, in accordance with the State's constitutional requirement that the Legislature be reapportioned within the first six years of each decade. The committee's staff proceeded with this work upon the assumption that the constitutionality of the State's apportionment formula would be upheld in the courts, as in fact it was in this Court, after a full hearing on the merits. No bill was submitted to the Legislature, however, because of the pendency of this action.

6. The Supreme Court in a six to three decision reversed the decision of this Court and held that the apportionment of Senators and Assemblymen presently in effect was in violation of the Fourteenth Amendment to the Federal Constitution and that both Houses of the Legislature must be apportioned substantially on the basis of population on the principal of "one man, one vote". Even the Solicitor General of the United States in his brief did not ask for any such radical reversal of the accepted theory of representative government. The decision of the U. S. Supreme Court was handed down on June 15, 1964, and the matter was remanded to this Court in the usual course.

7. Frankly, neither your deponent nor the other members of the Committee anticipated this far-reaching reversal, not only of the Supreme Court's historic position of non-interference in the organization of state legislatures, but also of its position that the equal protection clause does not forbid such classification so long as such classification has a rational basis and is not purely arbitrary and capricious. It will, your deponent believes, be universally conceded that the New York apportionment which the Supreme Court found unconstitutional was based on a thoroughly rational plan and was in no way arbitrary or capricious.

8. Accordingly, all of the preparation and work of the Committee and all of its studies which were made prior to the decision of the Supreme Court were on the basis of the provisions of the 1894 constitution. The inference of the Mayor of the City of New York, set forth in Paragraph 11-c of his affidavit, that the committee, prior to the decision of the Supreme Court, had been studying plans to comply with the decision *is contrary to fact.*

9. I am aware of the appointment by Governor Rockefeller of a special Citizens' Committee headed by Dean Mulligan. This Citizens' Committee will have the full cooperation of your deponent, the Joint Legislative Committee on Reapportionment, and that committee's staff.

10. It is my belief that no temporary or permanent plan of apportionment can be evolved by the Joint Legislative Committee on Reapportionment or adopted by the Legislature until the many complex questions, now before the Citizens' Committee, have been considered and reported on by that Committee.

11. As Chairman of the Joint Legislative Committee on Reapportionment, your deponent finally states that a meeting of that committee will be called promptly upon the receipt of the report of the Governor's Citizens' Committee to consider and act upon its recommendations.

Dated: July 23, 1964.

/s/ ROBERT C. MCEWEN.

Sworn to before me this
23rd day of July, 1964.

MARY H. FEELY,
Notary Public,
Residing in St. Lawrence County.
Official No. 123.
My Commission Expires Mar. 30, 1966.

FILE COPY

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 611 and 623

JOHN P. LOMENZO, Secretary of State of the State of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Appellants,

and

JOHN H. HUGHES and LAWRENCE M. RULISON,
Intervenors-Appellants,

against

WMCA, INC., R. PETER STRAUS, JOSEPH DeMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,
Plaintiffs-Appellees,

and

PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; MAURICE J. O'ROURKE, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 611 and 623

JOHN P. LOMENZO, Secretary of State of the State of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Appellants,*

and

JOHN H. HUGHES and LAWRENCE M. RULISON, *Intervenors-Appellants,*

against

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. MCCAFFERTY, *Plaintiffs-Appellees,*

and

PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; MAURICE J. O'ROURKE, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, plaintiffs-appellees WMCA, Inc., R. Peter Straus, *et al.*, move that the judgment of the district court be affirmed. In this motion they are joined by defendants-appellees Paul R. Screvane, President of

the City Council of the City of New York, Eugene H. Nickerson, County Executive of Nassau County, and the Commissioners of the Board of Elections of the City of New York.

Statement

This is a direct appeal from an order entered on August 4, 1964 by a three-judge district court in implementation of this Court's decision in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, decided on June 15, 1964.

On June 24, 1964 (Tr. 28), appellees served a proposed order on mandate.[1] It followed precisely the prayer for relief of the complaint which had been filed on May 1, 1961 (Tr. 28). The proposed order would have declared the existing apportionment provisions invalid and enjoined the conduct of any election pursuant thereto. It would have further provided that the court proceedings be recessed until July 27, 1964 to enable the state authorities themselves to take implementing action (R. 2-7).

Upon the issuance of this Court's mandate, on Saturday, July 11, 1964, the district court ordered a hearing on July 15, 1964 to "hear the suggestions of all parties with reference to proper remedies, under equitable principles, that it would be desirable to adopt for the purpose of implementing the mandate of the Supreme Court of the United States" (R. 8).

The appellants filed no papers at or prior to the July 15 hearing (Tr. 13), took the position that the November 1964 elections should proceed under the existing, concededly invalid, apportionment formula (Tr. 11) and made no suggestions for implementation of this Court's decision prior to the November 1966 election (Tr. 16, 26).

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1. This action was taken prior to the issuance of this Court's mandate. Appellees had, however, requested that appellants sign a stipulation to have the mandate of this Court issue forthwith. No such stipulation was signed by appellants (Tr. 10).

At the conclusion of the July 15 hearing, the district court declared the present scheme of apportionment to be "unconstitutional and void" but did not enjoin the conduct of an election thereunder and recessed until July 24 [subsequently amended to July 27] "to await action, if any, by the duly constituted authorities of the State of New York in the light of this declaration and to hear any further representation by the parties litigant toward further implementation of the judgment of the court" (Tr. 78-79). At the July 15 hearing, Judge Ryan indicated (Tr. 54) that it might be advisable for appellees to be prepared, on July 27, with a specific plan for an actual reapportionment of the State.

By July 27, 1964, the State had taken no implementing action and appellees submitted a proposed Further Order on Remand (R. 125-245) which would have provided that "unless on or before August 3, 1964 the legislature of the State of New York shall have enacted and the Governor shall have signed a valid reapportionment law to apply to the next election to be held of the state legislature, this court will, on August 3, 1964, promulgate an order adopting, as an interim measure effective until such time as the State shall enact a valid reapportionment, one of the plans annexed hereto • • •". Annexed to appellees' proposed order were three reapportionment plans, each of which would have been effective prior to the November 1964 election.

Appellants submitted a proposed order which would merely have permitted the November 1964 election to be held under the existing unconstitutional apportionment formula and again made no representations or suggestions as to any implementation of this Court's decision prior to the November 1966 election (R. 253-255).

It was against this background that the court on July 27th, after several hours of deliberation (Tr. 193), promulgated the order which is the subject of this appeal. That order permitted the November 1964 election to be conducted under the existing apportionment:

> "• • • provided that the terms of said Members so elected on November 3, 1964, or at any special election to fill vacancies, shall expire on December 31, 1965, and providing further that not later than April 1, 1965, the Legislature shall have enacted into law a valid reapportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965, Members so elected to hold office for a term of one year ending December 31, 1966." (J. St. 12)[2]

Immediately prior to the oral announcement of this order, Judge Waterman stated (Tr. 193):

> "You will note that it does not prevent the voluntary action within the timetable set forth of either the Governor or the Legislature."

In other words, the district court explicitly left it open to the Governor and Legislature to adopt a valid reapportionment prior to the November 1964 election, thus preserving the normal two-year term of office and eliminating the need for an additional election in 1965.

No implementing action was taken by the State and this appeal was noted by appellants (R. 474-478) and by two state senators who, on August 24, 1964, were granted leave to intervene as defendants (R. 472-473; 479-483).

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2. References designated "J. St." are to the Appellants' Jurisdictional Statement. The Jurisdictional Statement of Intervenors-Appellants is referred to as "Int.-App. J. St.".

Argument

The sole question presented by this appeal is whether the equitable powers of the district court enabled it to promulgate an order which: (a) permitted, as a matter of grace, a continuation of the existing unconstitutional malapportionment for only one, but not for two years, although the state constitution provides for a two-year term of office, and (b) set a deadline of April 1, 1965 for the adoption by the State of a valid apportionment. Such power clearly exists and has been exercised by courts in other reapportionment cases.[3] A contrary conclusion would frustrate reasonably prompt compliance with this Court's decisions and would impose a severe restraint upon the adoption, under equitable principles, of implementing orders. The appeal presents no substantial question and the order of the district court should be affirmed.

In remanding this case to the district court, this Court charged it with the responsibility of determining "under equitable principles" the date by which the New York State Legislature must be based upon a constitutionally valid apportionment. *WMCA, Inc.* v. *Lomenzo*, 377 U. S. at 655. See also *Reynolds* v. *Sims*, 377 U. S. 533, 585.

---

3. For example, the term of office of legislators has been reduced by court order in *Mann* v. *Davis*, Civ. 2604, E.D. Va., opinion and order dated Sept. 18, 1964, application for stay denied by the Chief Justice, Oct. 28, 1964, and in *Thigpen* v. *Meyers*, No. 5597, W.D. Wash., Decree, Oct. 5, 1964.

In some instances far more sweeping orders have been entered. See, *e.g.*, *Fortson* v. *Toombs*, No. 300, Oct. T. 1964, probable jurisdiction noted Oct. 12, 1964. For modification of this Order, see Motion to Dismiss, No. 300, pp. 19-21. See also *Parsons* v. *Buckley*; *Hoff* v. *Buckley*, Nos. 624-625, Oct. T. 1964. For other implementing orders, see opinions collected in XI Court Decisions on Legislative Apportionment, Nat. Munc. League, Sept. 1964.

Compare *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1954) where this Court wrote:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs".

There is no question that, under *Reynolds* v. *Sims*, *supra*, the district court could have ordered an immediate reapportionment. However, if appellants' contention is sound, the district court would have been limited to a choice between ordering such an immediate reapportionment or permitting the continuation of the unlawful condition for a period of two years (J. St. 5). Appellees had urged that sufficient time remained prior to the November 1964 election for an immediate reapportionment to be effective, but appellants strongly resisted this contention. Moreover, appellants offered not a single suggestion or representation as to any implementing action which they were willing to take which would have been effective prior to November 1966. It ill behooves appellants, therefore, to complain about the inconvenience and expense occasioned by the election ordered by the district court in 1965. And, surely the private interest of intervenors-appellants in avoiding the additional campaign expense they would incur should they become candidates for the State Senate in November 1965 (Int.-App. J. St. 7-8) hardly furnishes a basis to continue for an additional year the violation of the individual constitutional rights of the over 16,000,000 citizens of the state.

Appellants argue (J. St. 10) that nothing in the United States Constitution conflicts with a two-year term for state legislators. But this position overlooks the ele-

mentary constitutional principle that, when otherwise innocuous provisions of state law become vehicles for frustrating compliance with the Federal constitution, they may be temporarily suspended. "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operation from their own influence." *M'Culloch* v. *Maryland*, 4 Wheat. 316, at 427.

The court below did not void the provisions of Article III, Section 2, of the New York state constitution relating to dates of elections and terms of legislators[4]. The court merely suspended their operation until 1966 when New York State elects both a governor and a legislature. By employing the device of two successive one-year terms, the three-judge court not only brought the election of the legislature and the governor back into phase, but also gave the legislature additional time to enact a valid reapportionment scheme, without depriving the citizens of New York State of their constitutional rights for an unconscionably long period of time. Recourse to the amendment procedure contained in Article XIX of the New York state constitution would have been of no avail because, if that provision were applied, reapportionment of New York would be delayed until at least 1969 (see Article XIX, Section 1) with the result that the people of New York would be denied fair representation for five more years.

In requiring that New York be reapportioned by April 1, 1965, the three-judge court did not take the New York

4. Contrary to appellants' suggestion (J. St. 8), there would be no substance whatever to any challenge directed at the validity of legislative enactments based on an allegation that the legislature was not elected in conformity with the state constitution. *Matter of Sherrill* v. *O'Brien*, 188 N. Y. 185, 211-213.

legislature by surprise. WMCA originally brought suit in May 1961. This Court's remand of the case in 1962, *WMCA, Inc.* v. *Simon*, 370 U. S. 190, served to notify the State that its reapportionment scheme was of questionable validity[5] and the decision of this Court on June 15, 1964, of course, left no doubt. Reapportioning New York State within the time allotted is not an onerous task for the legislature. With limited means, appellees prepared, in twelve days, three different plans (R. 125-196). The Governor has already announced that he will call a special session of the outgoing legislature to meet in early December 1964 to adopt a new apportionment. New York Times, Oct. 20, 1964, p. 32.[6]

Appellants seek to bolster their contentions by references to statements made by individual members of the court during oral argument at the July 15 and July 27 hearings (J. St. 7). We fail to see any significance to expressions of doubt by a single judge in view of the fact that, after deliberation, that judge joined in the unanimous decree of the court. Equally without merit, is the contention (J. St. 7), similarly based on colloquy during argument, that the district court believed that it was compelled by the Supremacy Clause to enter its order. The district court made explicit in its orders of July 11 (R. 8), July 15 (Tr. 79) and July 27 (J. St. 12, 13) that it was engaged in a process of weighing the equities in order to formulate a proper remedy that would meet local

5. The Governor announced at that time that he was ordering a special staff study on the need for reapportionment. Affidavit of R. Peter Straus, R. 9, 10; New York Times, June 11, 1962, pp. 1, 26. The results of the study have never been made public.

6. If, as a result of what occurs at any legislative session or as a result of any other developments occurring subsequent to the promulgation of the order of the district court, a modification of that order seems appropriate, an application for such modification may be made to the district court which has retained jurisdiction of this case. Cf. *Fortson* v. *Toombs, supra*, p. 5, fn. 3.

conditions and be desirable under all the circumstances. In language and in action, the district court demonstrated that it properly discharged its responsibility to determine "'under equitable principles" what form of order would best adjust and reconcile public and private needs and would best serve the interests of the people of New York State.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The order of the three-judge district court should be affirmed.

Respectfully submitted,

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